Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3099

HENRY EKPERIGIN,
Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

Edward H. Passman, Passman & Kaplan, P.C., of Washington, DC, argued for petitioner.

L. Misha Preheim, Trial Attorney, Commercial Litigation Branc, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Director, and Todd M. Hughes, Deputy Director.

Appealed from: Merit Systems Protection Board.

Note: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-3099

HENRY EKPERIGIN, Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). DC0432080286-I-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, PROST, and MOORE, Circuit Judges.)

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED November 10, 2009 /s/ Jan Horbaly
Jan Horbaly, Clerk

HENRY EKPERIGIN, Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.

DOCKET NUMBER DC-0432-08-0286-I-1

MERIT SYSTEMS PROTECTION BOARD

110 M.S.P.R. 306; 2008 MSPB LEXIS 5887

November 14, 2008

COUNSEL:
[1]**

Debra A. D'Agostino, Esquire, Washington, D.C., for the appellant.

Monica Davy, Esquire, Washington, D.C., for the agency.

OPINION BY: SPENCER

OPINION:

[*306] BEFORE

Neil A. G. McPhie, Chairman

Mary M. Rose, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant

petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING [2] YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 19848

Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate **[**3]** United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on **[**4]** the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as

review the Board's regulations and other related material, at **[**5]** our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer

Clerk of the Board

Washington, D.C.

HENRY EKPERIGIN, Appellant, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.

DOCKET NUMBER DC-0432-08-0286-I-1

MERIT SYSTEMS PROTECTION BOARD

June 5, 2008

COUNSEL:
[*1]

Debra A. D'Agostino, Esquire, Passman & Kaplan, P.C., Washington, D.C., for the appellant.

Monica Davy, Esquire, Washington, D.C., for the agency.

ALJ:

BOGLE

ALJ-DECISION:

BEFORE

Elizabeth B. Bogle

Administrative Judge

INITIAL DECISION

On February 4, 2008, the appellant filed an appeal from a decision of the agency to remove him for performance-based reasons from the position of

Biologist, GS-0401-13, at the Food and Drug Administration (FDA). The Board has jurisdiction over the appeal. 5 U.S.C. § 4303(e). For the following reasons, the agency action is AFFIRMED.

Background

The appellant's Biologist position was located in the Food Safety Team (HFV-222), Division of Animal Feeds, Office of Surveillance and Compliance, Center for Veterinary Medicine. He was supervised during the relevant period by Karen B. Ekelman, Leader, Food Safety Team (HFV-222). By memorandum dated February 16, 2007, Ms. Ekelman informed the appellant that his performance was unacceptable in the critical element of individual work, and he would be placed on a performance improvement plan (PIP) for 120 days. Appeal File (AF) tab 7, subtab 4G.

By notice dated October 18, 2007, Ms. **[*2]** Ekelman proposed the appellant's removal for unacceptable performance of the critical element. AF tab 4, subtab 4E. The appellant made written and oral replies. AF tab 7, subtabs 4C, 4D. On December 20, 2007, Ms. Ekelman issued a decision to remove the appellant for unacceptable performance. Sharon Benz, Director, Division of Animal Feeds, concurred in the decision. AF tab 7, subtab 4B. The appellant was removed on January 4, 2008. AF tab 7, subtab 4A.

Legal standard

In appeals from performance-based actions taken under 5 U.S.C. chapter 43, the agency must prove by substantial evidence that (1) The performance

standards were valid; (2) The appellant's performance in at least one critical element was deficient as charged; and (3) The appellant was provided a reasonable opportunity to demonstrate acceptable performance. 5 U.S.C. §§ 4302-4304; *see Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, P 7 (2001).

Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons **[*3]** might disagree. 5 C.F.R. § 1201.56(c)(1). To meet its burden, the agency evidence need not be more persuasive than the evidence presented by the appellant. *See Lovshin v. Department of the Navy*, 767 F.2d 826, 844 (Fed.Cir.1985), *cert.denied*, 475 U.S. 1111, 106 S. Ct. 1523, 89 L. Ed. 2d 921 (1986); *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 624 (1984).

The performance standards were valid

The agency must establish performance standards that will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job. 5 U.S.C. § 4302(b)(1). Performance standards must be reasonable, sufficient in the circumstances to permit accurate measurement of the employee's performance, and adequate to inform the employee of what is necessary to achieve a satisfactory or acceptable rating. *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1052 (Fed.Cir.1985). The performance standards can be "fleshed out" in further detail by informing an

employee of the specific areas in which he needs improvement and of the specific tasks by which he could **[*4]** satisfy the agency's concerns. Id. at 1056. This "fleshing out" is additional support for determining that the performance standards are valid as applied to a particular employee because it suggests that an employee was informed as to what was necessary to achieve an acceptable rating. *Id.*

Applying this reasoning, the Board and the Court of Appeals for the Federal Circuit have approved standards that might otherwise have failed the "objective criteria" test because the standards were applied reasonably and "fleshed out" in the PIP notice. *See Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1337 (Fed.Cir.2004); *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, 17-19 (2004); *Thomas v. Department of Defense*, 95 M.S.P.R. 123, 129 (2003), *aff'd*, 117 Fed. Appx. 722 (Fed.Cir.2004); *Greer v. Department of the Army*, 79 M.S.P.R. 477, 483-84 (1998).

The appellant was informed in the PIP notice that he had failed to meet two performance measures for critical element one, individual work. His performance evaluation plan explained that a failure to meet one or more performance measures **[*5]** would result in a failure to meet for the critical element. AF tab 7, subtab 4H. He was informed that he must improve his performance to the "acceptable level" by June 15, 2007. *Id.*

The performance measures for the critical element were written at the meets level. The measure for "manner of performance," required:

Work products are clear and well-organized.

Communicates clearly and effectively in writing.

Completes work within established deadlines.

Works independently with little need for supervision or help.

Follows management procedures, directives, regulations, or technical orders.

As evidenced by: work products requiring minimal revision of technical issues.

As evidenced by: completing at least 80% of new work assignments by their due dates.

The measure for "communication" required:

Seeks other opinions, as appropriate, to produce balanced work product.

Keeps supervisor apprised of changes, progress, and barriers to progress.

Undertakes difficult assignments with a professional attitude.

> Adjusts positively to changes in workload and priorities.
>
> *As evidenced by: keeping the Team Leader and* **[*6]** *Division Director informed about issues that arise in your area of responsibility and expertise.*

AF tab 7, subtab 4H.

An agency may give content to performance standards by informing the employee of specific work requirements through written instructions, information concerning deficiencies and methods of improving performance, memoranda describing unacceptable performance, and responses to the employee's questions concerning performance. *Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161 (1996). The fact that performance standards may call for a certain amount of subjective judgment by the supervisor does not render them invalid especially where the appellant's position involves the type of professional judgment which is not susceptible to a mechanical rating system. *Id.* at 162.

In the PIP notice, Ms. Ekelman provided the appellant examples of how his performance was unacceptable. With respect to "manner of performance," she stated: (1) During 2006, the appellant completed nine DAF and two STARS assignments n1 that had been assigned before 1/1/06 (old assignments). However, on January 1, 2007, he still had three STARS assignments that **[*7]** were more than three years overdue, one DAF assignment that was more than two years overdue, and one DAF

assignment that was more than six months overdue. In addition, he had five new DAF assignments that were overdue by less than three months. (2) During 2006, he completed 15 new DAF assignments, five of them on time and ten were late. With respect to "communication," she stated: (1) The appellant failed to inform her in their meetings of any barriers to progress in his assignments; (2) Although she provided him a specific priority order for has assignments, he did not begin to follow it until late in the year; (3) When she asked about the status of pending assignments, he did not respond a majority of the time. AF tab 7, subtab 4G.

> n1 DAF is Division of Animal Feeds and STARS is Submission Tracking and Assignment System.

Ms. Ekelman advised the appellant that during the PIP he must:

> 1. Complete 80% or more of his pending, not overdue, assignments by their due dates.
>
> 2. Have no assignments that **[*8]** were more than three months overdue.
>
> 3. Follow the Division's and Team's established priority order for assignments.
>
> 4. Follow her specific instructions about the priority order for assignments, when provided.

> 5. Meet with her weekly to discuss progress on, problems with, and barriers to his assignments.
>
> 6. Inform her immediately about important issues concerning his progress on, problems with, and barriers to completion of his assignments by their due dates.

Id.

In *Wilson v. Department of Health and Human Services*, 770 F.2d at 1055, the court explained that the performance requirements for a professional position cannot be expected to be set forth in a "purely mechanical way." Some tasks may only be rated "with a certain modicum of subjective judgment." *Id.* In this case, the appellant's "meets" standard is similar to the standard upheld by the court in *Wilson* (as to appellant Jackson). *Id.* at 1055-56. The court found the standard "sufficiently objective and precise in the sense that most people will understand what [it] mean[s] and what [it] require[s]." *Id.* Moreover, the court observed that the **[*9]** agency did not base its action "solely on the performance standard." The performance standard "reasonably informed" the employee how he was to perform, and, when he failed to meet expectations, he was informed of the specific areas that needed improvement and the tasks he needed to perform. *Id.* at 1056. Similarly, in this case, the agency did not rely solely on the standard. Ms. Ekelman informed

the appellant in the PIP notice of the reasons she found the appellant's performance unacceptable and how his performance needed to improve. In addition, although the parties dispute how many in-person meetings were held, it is undisputed that the appellant's work during the PIP was discussed in meetings and in e-mails. Finally, I have considered that the appellant has not shown to have expressed any confusion over what was required to demonstrate acceptable performance. For all these reasons, I find that the appellant's "meets" standard was not impermissibly subjective. Thus the agency has established that the performance standard was valid.

In *Jackson-Francis v. Office of Government Ethics*, 103 M.S.P.R. 183 (2006), the Board held that when an agency has **[*10]** adopted a performance appraisal system that includes a "minimally successful" rating level, the employee cannot be required to reach a "fully successful" level of performance during the PIP to avoid removal. *Id.* at 186. In this case, the appellant's unacceptable rating under his 2006 performance evaluation plan led to the PIP. AF tab 7, subtab 4G. The plan provided for two rating levels: meets performance measures, and fails to meet performance measures. AF tab 7, subtab 4H. Because the agency's appraisal system did not include a "minimally successful" rating level, the appellant could be required to reach the "meets" level during the PIP. No basis for changing this conclusion is provided by the fact that the appellant's 2007 performance plan did provide for four rating levels including "minimally successful." AF tab 7, subtab 4I. The appellant was never rated under this plan and the PIP clearly communicated to him that he would

be required to reach the "meets" level for critical element one under the 2006 plan. *See Thompson v. Department of the Navy*, 89 M.S.P.R. 188, 194 (2001) (an employee's performance standards may not be substantially changed **[*11]** at the beginning of a PIP).

The appellant's performance of a critical element was deficient

To sustain a chapter 43 removal action, an agency must show by substantial evidence that the appellant's performance was unacceptable in at least one critical element. *Luscri v. Department of the Army*, 39 M.S.P.R. 482, 490 (1989), *aff'd*, 887 F.2d 1094 (Fed.Cir.1989) (Table). Normally, the Board "should give deference to the judgment by each agency of the employee's performance in light of the agency's assessment of its own personnel needs and standards." *Greer v. Department of the Army*, 79 M.S.P.R. 477, 485 (1998), *citing*, *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1562 (Fed.Cir.1985), *cert. denied*, 475 U.S. 1108, 106 S. Ct. 1514, 89 L. Ed. 2d 913 (1986).

The agency charged that at the beginning of the PIP the appellant had no pending (not overdue) DAF assignments and no pending (not overdue) STARS assignments that had due dates during the PIP. During the PIP, he was given five DAF assignments and two STARS assignments with due dates during the PIP. He completed one of the STARS assignments and three of the DAF assignments **[*12]** by their due dates or 57% of his pending (not overdue) DAF and STARS assignments. His performance did not reach the "meets" level because he did not complete 80% of

his pending (not overdue) assignments by their due date. During the hearing, the appellant stipulated that these assignments were not completed by the due date.

The agency also charged that by the end of the PIP the appellant was required to have no old, overdue assignments that were more than three months overdue. At the beginning of the PIP, the appellant had five overdue DAF and three overdue STARS assignments. He completed four of the overdue DAF assignments and none of the overdue STARS assignments. At the end of the PIP, he still had one DAF assignment that was more than three months overdue and three STARS assignments that were more than three months overdue. Therefore, he did not reach the "meets" level because he had assignments that were more than three months overdue at the end of the PIP.

The DAF assignment was DAF06216S07001. Ms. Ekelman testified that this assignment was not completed on time. It was reassigned to another employee and completed by her. An assignment is complete when it is logged out of the **[*13]** DAF or STARS databases. The agency submitted documentation showing that the assignment was received on November 24, 2006, and assigned to the appellant with a due date of January 24, 2007, but it was completed on October 12, 2007, by another employee (Li). AF tab 18, exhibit 45. The appellant testified that it was his understanding the assignment would be closed out using an e-mail that he had worked on (AF tab 19, exhibit M). He admitted on cross-examination, however, that another employee (Geltman) wrote the email.

Because the basis for the appellant's "understanding" was unclear and because it directly conflicts with Ms. Ekelman's testimony and the agency's documentation that the assignment was logged out after it was completed by another employee, I find the agency evidence more persuasive.

The STARS assignments were C002245A0000, C002245G0001, and C002245G002. All three assignments concerned a petition (FAP 2245) to permit the use of formaldehyde in animal feed. Ms. Ekelman testified that the appellant submitted several drafts and she provided him extensive comments. *See* AF tab 18, exhibits 25, 27, 28, 30 - 35, 37-40. Primarily, she wanted him to either include an explanation **[*14]** for his conclusions or provide a copy of an earlier agency position paper he said he was relying on. She experienced so much difficulty getting the appellant to make the changes that she enlisted the assistance of another employee, Dennis McCurdy, Senior Regulatory Review Chemist. Mr. McCurdy testified that he met with Ms. Ekelman and the appellant and functioned as a "mediator." His advice to the appellant was to make the changes she requested. Ms. Ekelman testified that the appellant finally produced an acceptable draft on June 19, 2007 (AF tab 18 exhibit 39). However it was not logged out until June 22, 2007, after the completion date of the PIP. The appellant's testimony was confusing. He did not deny that the assignment required multiple drafts or that the final, acceptable draft was submitted after the completion date of the PIP. Based on Ms. Ekelman's testimony, the agency evidence of the appellant's drafts annotated with Ms. Ekelman's comments, and the final, acceptable draft that was

submitted after the PIP, I find that the appellant failed to complete these STARS assignments during the PIP.

Because the appellant has stipulated that he failed to complete 80% of his pending, **[*15]** not overdue, assignments by their due date during the PIP, and I have found that he had old, overdue assignments that were pending at the end of the PIP, I conclude that the agency has shown by substantial evidence that the appellant's performance of critical element for individual work was deficient as charged. In making this finding, I am mindful that under the substantial evidence standard the agency evidence need not be more persuasive than the evidence presented by the appellant. *See Lovshin v. Department of the Navy*, 767 F.2d at 844.

The appellant was provided a reasonable opportunity to improve

To demonstrate that the employee received a bona fide opportunity to improve, the agency must prove that it gave the employee adequate instructions regarding the manner in which he was expected to perform the duties of his position prior to holding him accountable for deficiencies in such performance. *Jones v. National Gallery of Art*, 36 M.S.P.R. 602, 604 (1988), *aff'd*, 864 F.2d 148 (Fed.Cir.1988) (Table), *citing, Chang v. Department of Education*, 30 M.S.P.R. 160, 161 (1986); *Shuman v. Department of the Treasury*, 23 M.S.P.R. at 623. **[*16]** Relevant factors for determining whether an agency has afforded an employee a reasonable opportunity to demonstrate acceptable performance include the nature of the duties and responsibilities of the

employee's position, the performance deficiencies involved, and the amount of time which is sufficient to enable the employee to demonstrate acceptable performance. *See Macijauskas v. Department of the Army*, 34 M.S.P.R. 564, 566 (1987), *aff'd*, 847 F.2d 841 (Fed.Cir.1988) (Table).

The appellant was afforded 120 days to improve his performance. The PIP notice explained the standard he must meet to attain a "meets" level of performance. It also explained the reasons why his performance was unacceptable and how it must improve. Ms. Ekelman monitored his performance and provided him feedback. Based on the information provided in the PIP notice and the feedback appellant received from Ms. Ekelman, I find that the appellant was afforded adequate assistance. *See Goodwin v. Department of the Air Force*, 75 M.S.P.R. 204, 207-08 (1997); *Gjersvold v. Department of the Treasury*, 68 M.S.P.R. 331, 335-36 (1995).

In summary, the appellant **[*17]** was specifically informed of the deficiencies in his performance and of what he must do to improve. The PIP period was an adequate amount of time for him to demonstrate the required improvement. The appellant, I conclude, was provided a reasonable opportunity to demonstrate performance at the "meets" level. *See Robinson v. Department of the Army*, 50 M.S.P.R. 412, 419 (1991).

Discrimination

The appellant alleges that his removal was taken because of discrimination based on race (Black). The appellant may prove discrimination by direct or

indirect evidence. Direct evidence may be any statement made by an employer that 1) reflects directly the alleged discriminatory attitude and 2) bears directly on the contested employment decision. *See Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, 120-21 (2000), *citing, Dorsey v. Department of the Air Force*, 78 M.S.P.R. 439, 448 (1998). By indirect evidence, an employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the **[*18]** protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). When the employee has met his burden, the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The appellant offered no direct or indirect evidence of discrimination.

The appellant testified on cross-examination that he believed his removal was based on race discrimination because Ms. Ekelman did not hire anyone to help him with the backlog but she did hire employees to work in other areas. The appellant's testimony is unavailing. He failed to establish that the other employees who allegedly were being helped by new hires were similarly situated individuals outside of his protected group. And he failed to

establish that either Ms. Ekelman or Ms. Benz was responsible for the new hires. Therefore, **[*19]** the appellant has not met his burden of proof on the affirmative defense of discrimination by either direct or indirect evidence.

Reprisal

In order to establish the affirmative defense of reprisal, the appellant is required to show that: (1) he engaged in protected activity; (2) the accused official knew of the activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) after a careful balancing of the intensity of the motive to retaliate against the gravity of the misconduct, a nexus is established between the motive and the subsequent action. *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 623-24 (2001), *review dismissed*, 32 Fed. Appx. 543 (Fed.Cir.2002), *citing, Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

The appellant engaged in protected activity on October 9, 2007, by filing a discrimination complaint alleging that the agency was harassing him and treating him disparately with regard to performance evaluations and promotions. He also testified that he was involved in unspecified "diversity initiatives." The removal action could not have **[*20]** been taken in retaliation for the discrimination complaint because Ms. Ekelman did not learn of the complaint until November, after she had proposed removal, and Ms. Benz did not learn of it until he filed his Board appeal, after she had concurred in the removal action. Ms. Ekelman testified that she was aware of the appellant's participation in "diversity initiatives,"

however because of the unspecified nature of these activities, I find that the appellant has not shown she had any motive to retaliate for them.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/

Elizabeth B. Bogle

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **July 10, 2008**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which **[*21]** you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW.,

Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board **[*22]** will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5

C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or e-mail is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. If **[*23]** the petition is filed by e-mail, and the other party has elected e-Filing, including the party in the address portion of the e-mail constitutes a certificate of service.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations

Equal Employment Opportunity Commission

P.O. Box 19848

Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing

a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action **[*24]** under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals

for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that

gives you this right. It is found in Title [*25] 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

§ 4301. Definitions

For the purpose of this subchapter [5 USCS §§ 4301 et seq.]--

(1) "agency" means--

(A) an Executive agency; and

(B) the Government Printing Office;

but does not include--

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office [Government Accountability Office];

(2) "employee" means an individual employed in or under an agency, but does not include--

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Veterans Health Administration of the Department of Veterans Affairs whose pay is fixed under chapter 73 [74] of title 38;

(D) an administrative law judge appointed under section 3105 of this title [5 USCS § 3105];

(E) an individual in the Senior Executive Service or the Federal Bureau of Investigation and Drug

Enforcement Administration Senior Executive Service;

(F) an individual appointed by the President;

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter [5 USCS §§ 4301 et seq.] by regulations of the Office of Personnel Management; or

(H) an individual who (i) is serving in a position under a temporary appointment for less than one year, (ii) agrees to serve without a performance evaluation, and (iii) will not be considered for a reappointment or for an increase in pay based in whole or in part on performance; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

5 USCS § 4302 (2009)

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

(c) In accordance with regulations which the Office shall prescribe, the head of an agency may administer and maintain a performance appraisal system electronically.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to--

(A) 30 days' advance written notice of the proposed action which identifies--

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which--

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with

regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee--

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee--

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is--

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75 [5 USCS §§ 7511 et seq.],

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 [5 USCS § 7701].

(f) This section does not apply to--

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title [5 USCS § 3321(a)(2)],

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

5 USCS § 7703 (2009)

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment

seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title [5 USCS § 7702] shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section is referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition in the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

28 USCS § 1254 (2009)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.